Office - Supreme Court, U.S.
FILED
DEC 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 83 - 914

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MERICAN, INC.; MERICAN CURTIS, INC.; AND MERICAN CURTIS, LTD.,

Petitioners,

vs.

CATERPILLAR TRACTOR CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF THIRTY-EIGHT STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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I.

INTEREST OF AMICI STATES

The States of California, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and the Commonwealths of Kentucky, Massachusetts and Pennsylvania submit this brief pursuant to Supreme Court Rule 36 in support of Petitioners Merican, Inc., et al., plaintiffs in the proceedings below.

A. IDENTITY OF AMICI STATES

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they have legal responsibility for enforcing their respective states' antitrust laws.1/ In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal

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1/ Georgia does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens.2/

B. AMICI STATES' INTEREST IN THIS CASE

Because of their major role in the enforcement of federal antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's antitrust jurisprudence. Moreover, the states' antitrust laws are often construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.3/

State governments are substantial consumers in the national economy. The value of state purchases annually exceeds $1 billion. In many instances, the states are indirect purchasers, particularly in major construction projects. The 1977 Illinois Brick, infra, decision has impaired the Amici States' efforts to

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2/ 15 U.S.C. § 16c

3/ See, e.g., People v. North Avenue Furniture & Appliance (Colo. 1982) 645 P.2d 1291; Neyens v. Roth (Iowa 1982) 326 N.W.2d 294; Grams v. Boss (Wisc. 1980) 97 Wisc.2d 332, 294 N.W.2d 473; Marin County Bd. of Realtors v. Palsson (Calif. 1976) 130 Cal.Rptr. 1, 549 P.2d 833; State v. Readers Digest Assoc. (1972) 81 Wn.2d 259, 501 P.2d 290; Pittsburg Plate Glass Co. v. Paine & Nixon Co. (Minn. 1931) 234 N.W. 453.

enforce the antitrust laws to recover overcharges that have been paid from the states' treasuries, ultimately at the taxpaying public's expense. See, Maness, State Antitrust Enforcement: Its Evolution and Future Direction, 27 Antitrust Bulletin 821, 848 (1983).

The Amici States believe that the Third Circuit's decision on review here does not promote vigorous and effective antitrust enforcement. The decision undermines the antitrust enforcement policy implicit in the Court's recent McCready, infra, and Associated General, infra, opinions, and if allowed to stand, will be another step in permanently curtailing the ability of the Amici States' Attorneys General to protect and promote competition under the charter of the antitrust laws.

SUMMARY OF ARGUMENT

This Court should grant plaintiffs' petition for a writ of certiorari to decide: 1) whether the lack of privity between antitrust parties may in itself deny a Clayton Act remedy to direct victims of anticompetitive conduct; 2) whether Illinois Brick applies to allegations other than where a single overcharge is passed-on through a distribution chain; and 3) whether the proof of damages flowing from a boycott enforced by imposing a discriminatory price penalty is impermissibly complex.

In the Amici States' view, this Court's McCready and Associated General decisions confer

standing on plaintiffs here, irrespective of their non-privity with defendant. Pp. 4-9, infra. The indirect purchaser rule of Illinois Brick promotes antitrust enforcement only when strictly confined to pass-on situations. Pp. 6-11, infra. Finally, Illinois Brick did not create a separate "complexity test" for all antitrust allegations, pp. 9-14, infra, and the lower courts' approval of "bootstrap complexity" defenses that have emerged since Illinois Brick has impaired the effectiveness of private antitrust enforcement. Pp. 14-18, infra.

II

THE COURT SHOULD EXERCISE ITS CERTIORARI JURISDICTION TO CORRECT THE THIRD CIRCUIT'S GRIEVOUS MISAPPLICATION OF ILLINOIS BRICK

A. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT PLAINTIFFS' CLAIMS INVOLVE PROOF SO COMPLEX THAT PLAINTIFFS' INJURIES CANNOT BE VINDICATED UNDER THE CLAYTON ACT

1. The Decision Below.

The court below transformed Illinois Brick[4/] from guidance about the role of economic proof where defendants' conspiratorial overcharges are allegedly passed-on through a multi-tiered distribution chain to plaintiff, into a doctrine of standing requiring

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4/ Illinois Brick Co. v. Illinois (1977) 431 U.S. 720.

privity between antitrust plaintiffs and defendants. Merican Inc. et al. v. Caterpillar Tractor Co. (3d Cir. 1983) 713 F.2d 958. The court reached this result by first characterizing plaintiffs as indirect purchasers, who as nonfactory-authorized dealers acquired electrical generators for resale overseas from OMCO, an authorized domestic dealer. 713 F.2d at 967. Then the court held that the district court erred when it did not consider whether the Illinois Brick concerns of avoiding duplicate recovery and complex economic proceedings deprive plaintiffs of standing. 713 F.2d at 966.

Plaintiffs purchased generators at less than the list resale price, but did not receive the full 25% discount from list price that Caterpillar allowed its authorized dealers. 713 F.2d at 960. Plaintiffs provided all warranty services in conjunction with reselling the generators overseas, presumably at less than the list resale price to end-users. Caterpillar calculated the cost of services to be 5% of the list resale price and required its dealers to return that amount if they sold outside their authorized territories. The service fee would then be paid to the dealer who actually claimed to have performed warranty service. If no service was required during the warranty period, Caterpillar returned the 5% assessment to the dealer who made the extra-territorial sale. 713 F.2d at 960.

Allegedly at the behest of an authorized dealer who competed with plaintiffs in Saudi Arabia, Caterpillar discontinued reimbursing the servicing dealers while still retaining the 5% penalty for sales outside a dealer's territory. The result was that OMCO could not sell to plaintiffs at as much of a discount as it once did. 713 F.2d at 961.

In effect Caterpillar enforced a boycott against plaintiffs by imposing a discriminatory wholesale price penalty on OMCO. The court rejected plaintiffs' claim that the new service fee policy evidenced a conspiracy between Caterpillar and its Saudi dealer to raise plaintiffs' costs, and to allocate customers and territories thus eliminating plaintiffs as a source of resale competition. Instead, the court mistakenly adopted Caterpillar's contention that the new unrefundable service fee penalty collected on extra-territorial sales was a passed-on overcharge that rendered plaintiffs "indirect" victims of an overcharge to OMCO. 713 F.2d at 963.

2. As the Direct Targets of Defendant's Discriminatory Pricing System, Plaintiffs Have Standing to Challenge Defendant's Conduct as Anticompetitive.

The Amici States submit that the court below mistakenly treated the non-privity between the parties as automatically transforming Illinois Brick's concerns over avoiding double recovery and economic complexity

into a rule of standing — which it is not. Illinois Brick, supra, 431 U.S. at 728 n.7. In Blue Shield of Virginia v. McCready (1982) 457 U.S. 465, 475 n.11, this Court suggested that Illinois Brick best serves the antitrust laws' remedial purposes when confined to its facts. Because the difficulty of ascertaining damages should not be confused with the right of recovery, the Clayton Act, 15 U.S.C. § 16, "plainly focuses on tangible economic injury." 457 U.S. at 475 n.11. The lower court disregarded this standard by adopting a rigid analogy to Illinois Brick, concentrating on the superficial indirect relationship between the parties. Consequently, before Illinois Brick becomes a permanent barrier that all antitrust plaintiffs must hurdle, this Court should address whether the court below correctly held that Illinois Brick applies beyond horizontal price-fixing occuring at the upper level in a multi-tiered distribution chain. Caterpillar, supra, 713 F.2d at 967.

The lower court's willingness to expand Illinois Brick beyond pass-on situations to preclude the admitted victims of Caterpillar's conduct from recovering[5/] conflicts with this Court's opinion in Associated General Contractors v. California State

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5/ "For purposes of this appeal, Caterpillar has conceded that Appellees would have standing if their claims are not barred by Illinois Brick." Caterpillar, supra, 713 F.2d at 966 n.19.

Council of Carpenters (1983) __ U.S. __, 74 L.Ed.2d 723. In that case, the Court held that the Clayton Act affords the right of recovery to those consumers or competitors who participate "in the market in which trade was restrained." 74 L.Ed.2d at 738. Here, the admitted victims of defendant's discriminatory service penalty competed with defendant's authorized dealers for sales to users of electrical generators. They are hardly too remote from defendant to be accorded standing.

If defendant's service penalty harmed anyone it was plaintiffs. While Caterpillar collected the 5% service fee to compensate authorized dealers who provided warranty service on generators sold outside another dealer's territory, plaintiffs' supplier OMCO was able to reduce its price to plaintiff, knowing that Caterpillar would return the 5% assessment because plaintiff provided all services and thus no authorized dealer would seek reimbursement. However, when Caterpillar stopped returning unclaimed service fees as a matter of policy, OMCO lost its previous ability to reduce its prices to plaintiffs. With OMCO now unable to offer plaintiffs as great a discount as before, Caterpillar had curtailed plaintiffs' competitiveness against its Saudi dealer.

The lower court therefore erred twice under Associated General: first, by refusing to accept plaintiffs' allegations as true, 74 L.Ed.2d at 730, and

second, by denying plaintiffs standing as the direct target of defendant's anticompetitive conduct. 74 L.Ed.2d at 738.6/

3. There is Nothing in This Case That Portends Duplicate Recovery, Nor Is the Economic Theory of This Case So Complex That It Falls Within the Purview of Illinois Brick.

In Illinois Brick this Court fashioned a rule of judicial administration intended to streamline litigation and to promote antitrust enforcement. That rule prefers direct purchasers to vindicate the Clayton Act where a single conspiratorial overcharge may make its way through a distribution chain to other sellers and the end-users.

In Illinois Brick the trial court confronted the task of deciding how to avoid duplicate recovery where a single overcharge was to be allocated among several

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6/ The Caterpillar result would probably not have been reached in the Seventh Circuit. Independence Tube Corp. v. Copperweld Corp. (7th Cir. 1983) 691 F.2d 310, cert. granted on other grounds, Supreme Court No. 82-1260. There, the court had no difficulty approving plaintiff's standing to challenge the lawfulness of a boycott imposed when defendants induced a third party to void an agreement to supply a tubing mill to plaintiff. Moreover, making certiorari here all the more appropriate, Supreme Court Rule 17.1(a), is the disparity between the Third Circuit's Caterpillar standing analysis and a recent Ninth Circuit analysis under Associated General, supra. Parks v. Watson (9th Cir. 1983) 716 F.2d 646, 658.

classes of purchasers where separate markets intervened between the claimants. To assure enforcement on these facts, the Illinois Brick Court chose to allow direct purchasers full recovery instead of approving protracted economic proof of tracing and apportionment among all purchasers. Illinois Brick, supra, 431 U.S. at 745.

The Court held that the presence of intermediaries posed a threat of duplicate recovery, and that the economic proceedings required to apportion among direct and indirect purchasers damages flowing from a manufacturers' conspiratorial overcharge were so complex that they impaired treble damages actions. Illinois Brick, supra, 431 U.S. at 730 and 745. Nowhere did the Court hold that complexity alone had become an acceptable pleading defense in all antitrust cases. Nowhere did the Court require that economic proof in all antitrust cases be made with arithmetic exactitude.

a. The Threat of Duplicate Recovery Here Is Non-existent.

In spite of Illinois Brick's closely drawn holding, the court below decided that plaintiffs' non-privity with defendant was in itself sufficient to raise the possibility of duplicate recovery and render proof of damages from Caterpillar's new service fee penalty impermissibly complicated. Caterpillar, supra, 713 F.2d at 969. The lower court reached this conclusion outside a pass-on situation, postulating that

OMCO, the authorized dealer from whom plaintiffs purchased, might sue on the same Caterpillar transactions. 713 F.2d at 969.

The lower court's error lies in its assumption that OMCO and plaintiffs would suffer the same damage. Although defendant's conspiratorial act of retaining the 5% service fee as a penalty to enforce a boycott may have harmed both plaintiffs and OMCO, there is no passing-on here because the penalty did not raise OMCO's wholesale price. Caterpillar's conspiratorial penalty simply raised plaintiffs' costs so high that they were driven into unprofitability. OMCO lost its profitable business with plaintiffs.

This case, then, involves two damage claims that do not overlap: 1) plaintiffs' lost profits on the sales it would have made but for defendant's boycott; and 2) OMCO's separate lost profits on sales that were not made to plaintiffs after Caterpillar began enforcing the boycott. Each set of lost profits was an independent function of Caterpillar conspiratorially ending its policy of refunding the 5% service fee set-aside when no dealer claimed it.

The offending fixed rate service fee penalty was not a passed-on overcharge, and was, therefore, not subjected to the same uncertainties of intervening market forces between plaintiffs and Caterpillar as the manufacturers' conspiratorial overcharge was in Illinois Brick. Consequently, the possibility of multiple claims against a single overcharge that troubled this Court in Illinois Brick is not present in this case.

b. Because the Dealers Sustained Separate Injuries, Proving Damages Does Not Involve Complex Economic Theories

As demonstrated above, each set of lost profits is a separate injury. They are not components of a single overcharge subject to multiple suits, but instead derive from one act that worked two distinct injuries.

Calculating plaintiffs' damages is simple: the trier of fact need only compare plaintiffs' profitability on its resales of Caterpillar generators before and after the boycott began.7/ If OMCO were to sue its supplier Caterpillar, its separate damages would be similarly easy to ascertain: OMCO's damages would be its lost profits on sales to plaintiffs based on its historic profitability.8/

Neither set of lost profits is difficult to measure compared to the Illinois Brick challenge of tracing and allocating a brick manufacturers' overcharge passed down the distribution chain to masonry contractors, general contractors, and governmental purchasers who dealt in separate markets.

7/ This comparison is the standard method for determining damages from market exclusion offenses. Zenith Radio Corp. v. Hazeltine Research, Inc. (1969) 395 U.S. 100, 123; Rangen v. Sterling Nelson & Sons., Inc. (9th Cir. 1965) 351 F.2d 851, 856, Cert. den. (1966) 383 U.S. 936.

8/ See, Bigelow v. RKO Radio Pictures, Inc. (1946) 327 U.S. 251, 257.

Plaintiffs' lost sales and profits are the direct, intended result of defendant's conduct, and readily proved. See note 7 supra. OMCO's lost sales are not subject to demand elasticities because the boycott affected only plaintiffs and not OMCO's other customers. Therefore, the simple and well established method of calculating OMCO's damages as the loss of historic profitability on plaintiffs' accounts is not the kind of economic theory that Illinois Brick disapproved. Bigelow, supra.

Accordingly, the Caterpillar court's quibble whether plaintiffs' proposed proof of damages is precise enough, 713 F.2d at 969, turns a deaf ear to this Court's admonition that "[t]he wrongdoer is not entitled to complain that they [antitrust damages] cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making, were otherwise." Story Parchment Co. v. Paterson Co. (1930) 282 U.S. 555, 563. Indeed, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," Bigelow, supra, 327 U.S. at 265, because "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of injury which it has itself inflicted." J. Truett Payne Co. v. Chrysler Motors Corp. (1981) 451 U.S. 557, 566.

Consequently, this Court's

> "willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of acertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."
>
> J. Truett Payne, supra, 451 U.S. at 566.

That the lower court here considered the task of proving damages fraught with complications testifies to the defense bar's success in conceiving and advancing artificial economic complexities since the advent of Illinois Brick. Caterpillar, supra, 713 F.2d at 969.

B. CERTIORARI WILL AFFORD THE COURT AN OPPORTUNITY TO EVALUATE WHETHER ILLINOIS BRICK IS BEING INTERPRETED IN ACCORDANCE WITH THIS COURT'S ANTITRUST JURISPRUDENCE

Over the past six years the courts have allowed resourceful counsel to view Illinois Brick as an invitation to invent complexity arguments, and in turn have analogized a panoply of allegations to the indirect purchaser context of Illinois Brick. The result has not been good for antitrust enforcement. See, e.g., In re Petroleum Products (9th Cir. 1982) 691 F.2d 1335

(retail gasoline purchasers barred from claiming damages where oil companies conspired on retail prices but sold through captive intermediary dealers); Stein v. United Artists Corp. (9th Cir. 1982) 691 F.2d 885, 897 n.5 (boycott to force primary shareholder to sell defendants half of his stock at less than fair market value); Jones v. Ford Motor Co. (10th Cir. 1979) 599 F.2d 394 (manufacturer-controlled dealership terminated non-voting stockholder's management contract at the behest of another dealer who complained that plaintiff's advertising infringed his territory and who eventually bought the terminated dealership from the manufacturer.)

These lower court decisions are a disservice to the Court's long-standing interpretation of the Clayton Act: deterring violators, depriving them of the fruits of their illegalities, and compensating victims of antitrust violations for their injuries. See, Illinois Brick, supra, 431 U.S. at 746. The Caterpillar decision under consideration here is but one more, truly blatant, misapplication of Illinois Brick that inhibits enforcement. While the Illinois Brick Court dispensed with certain complex economic proof to favor direct purchasers as private attorneys general in one limited situation, the lower courts in Caterpillar and other cases have mistaken Illinois Brick for a blanket antitrust defense wherever complicated economics can be hinted.

The recent surge of defensive economic theories that always seem to be complex, Caterpillar, supra, 713 F.2d at 769, should not be allowed to upset the enforcement-promoting antitrust jurisprudence that this Court has announced for nearly a century. United States v. American Cyanamid Co. (2d Cir. 1983) __ F.2d __, 1982-83 Trade Cases ¶ 65,656 at p. 69,299-65 (Supreme Court case law, not currently fashionable economic theory, must govern determinations under Section 7 of the Clayton Act.) Should the Caterpillar decision stand, it will add to the weight of precedent where the courts have willy-nilly applied Illinois Brick to dismiss cases, frustrating this Court's recent efforts to interpret the Clayton Act in a manner providing a cohesive enforcement scheme. Associated General, supra; McCready, supra; Reiter v. Sonotone Corp. (1979) 442 U.S. 330; Brunswick v. Pueblo Bowl-O-Mat, Inc. (1977) 429 U.S. 477.

As shown above, the Caterpillar court placed itself in this predicament of undermining private enforcement through its slavishly literal Illinois Brick interpretation that any non-privity between antitrust parties compels it to entertain defendant's arguments on economic complexity. This rigid reading of Illinois Brick assures an outcome impairing private enforcement and denying substantial justice; it disregards McCready's teaching that Section 4 of the Clayton Act "plainly focuses on tangible economic injury," McCready, supra, 457 U.S. at 475 n.11, while

encouraging lawyers to reach the perverse zenith of their skill — creating, rather than cutting away, complexity.

If the Caterpillar court's real problem was resolving whether plaintiffs' injuries were too remote to confer standing, it should have performed its analysis entirely under Associated General, supra. That did not happen; the court instead chose to base its decision on Illinois Brick, thus allowing its wooden application of Illinois Brick to trap its analysis in the never-never land of economic complexity. Caterpillar, supra, 713 F.2d at 960. The Caterpillar court has thus created a dangerous self-fulfilling prophecy, forgetting that "[r]ealities must dominate the judgement .... The Anti-Trust Act aims at substance." Continental T.V., Inc. v. GTE Sylvania, Inc. (1977) 433 U.S. 36, 47.

CONCLUSION

So far, Illinois Brick has not been the boon to antitrust enforcement that the Court had hoped to create. Instead it has become the basis of a pleading defense that many courts indiscriminately allow. The Third Circuit has erred here and so have others (Petroleum Products, supra; Stein, supra; Jones, supra) in extending Illinois Brick beyond the pass-on circumstances where market forces actually intervene between parties, where the economic theory for tracing and allocating a single conspiratorial overcharge is

complex, and where the risk of double recovery is greater than mere speculation.

This case raises "an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rules, Rule 17.1(c), so that certiorari should be granted. Certiorari is appropriate where rulings below "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States ...." Perma Life Mufflers, Inc. v. International Parts Corp. (1968) 392 U.S. 134, 136, and where the case presents important issues under the antitrust laws. Albrecht v. Herald Co. (1968) 390 U.S. 145, 146; National Broiler Marketing Assn. v. U.S. (1978) 436 U.S. 816, 818.

Respectfully submitted this 9th day of December, 1983.

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